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No. 91-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The American Bar Association, as *amicus curiae*, will address the following question:

Whether this Court should withdraw plenary federal habeas corpus jurisdiction from Fifth Amendment claims involving confessions compelled under the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. During the past decade, that dedication has led the ABA to make habeas corpus one of its highest priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state post-conviction procedures. In 1989, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by an overwhelming margin, a comprehensive habeas reform policy. The ABA, on the basis of its policies, has frequently testified before both Houses of Congress considering reform of the habeas corpus statutes.

In 1982, the ABA House of Delegates opposed legislation that would have withdrawn federal habeas jurisdiction over

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

claims that had been fully and fairly adjudicated in state court. As the associated report of the Section of Criminal Justice noted, withdrawal of this jurisdiction would foster disparity and would "encourage violations of the Supremacy Clause." ABA, Section on Criminal Justice, Report on Habeas Corpus, at 35 (Aug. 1982).

In 1985, the ABA opposed similar legislation on the ground that elimination of this jurisdiction would leave federal rights unprotected and unenforced, and would destroy uniformity of federal constitutional principles. Statement of Phylis Skloot Bamberger on behalf of the ABA before the Comm. on the Judiciary of the U.S. Senate on S. 238, at 11-12 (Oct. 8, 1985).

In 1991, the ABA again opposed the repeal of federal habeas jurisdiction over claims that were fully and fairly adjudicated in the state courts. The ABA endorsed "the same principle" that

> has guided Congress' treatment of habeas corpus since the First Judiciary Act of 1789: *the federal habeas corpus remedy — for capital as well as noncapital prisoners — should be as broad as the fundamental individual rights that the federal Constitution confers.*

Statement of John J. Curtin Jr., President of the American Bar Association, and James S. Liebman, Professor of Law, Columbia University School of Law, on behalf of the American Bar Association before the Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, U.S. House of Representatives, at 28 (July 17, 1991) (emphasis in original).

This Court has granted certiorari on the question whether a particular class of claims, those based on *Miranda v. Arizona*, 384 U.S. 436 (1966), should be stricken from federal habeas corpus jurisdiction when the claims have been fully and fairly adjudicated in state court. This question implicates the ABA's long-standing policy to support preservation of independent review of state court convictions on federal habeas corpus.

SUMMARY OF ARGUMENT

Congress has set the bounds of federal habeas corpus jurisdiction broadly. This jurisdiction includes claims of all varieties of unconstitutional custody. 28 U.S.C. §§ 2241(c)(3), 2254(a). The petitioner and some of her *amici* are wrong to suggest that this Court is free to repeal the jurisdiction that the legislature has conferred. As the Court stated just last year, reaffirming long-settled principles, "the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner." *McClesky v. Zant*, 111 S. Ct. 1454, 1462 (1991).

The Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), which balanced the costs against the benefits of enforcing the Fourth Amendment exclusionary rule on collateral attack, is not to the contrary. The Court in *Stone* explicitly reaffirmed settled principles of habeas corpus jurisdiction, and claimed no authority to reshape the jurisdiction that Congress has established. Instead, the Court stressed the differences between the Fourth Amendment exclusionary rule and constitutional rights that protect a defendant's right to a fair trial under our accusatorial system, including rights under the Fifth and Sixth Amendments. The Fourth Amendment exclusionary rule, the Court said, serves no other significant purpose than to deter the police generally from committing future Fourth Amendment violations against other people. On this view, a defendant who has been convicted upon illegally seized evidence is not thereby in custody unconstitutionally.

In *Stone* and later decisions, the Court repeatedly has distinguished the Fourth Amendment exclusionary rule, which does not protect a defendant's trial rights, from constitutional rules that do, including rules announced in *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Miranda*, the Court recognized that compulsion is inherent in custodial interrogation, and that secrecy usually surrounds it. To protect a defendant's Fifth Amendment rights in this setting, the *Miranda* Court created, and required the lower courts to observe, a conclusive presumption of compulsion unless specified procedures were followed, including administration of the familiar warnings. The foremost purpose of this evidentiary requirement is to protect the Fifth Amendment rights of the defendant who invokes it, for the Court concluded that custodial interrogation in the absence of warnings very likely *is* coercive, even when the secrecy of incommunicado questioning prevents more direct proof.

The sort of balancing that the Court conducted in *Stone v. Powell* is, therefore, misplaced here, because a state prisoner who has been convicted upon a confession admitted in violation of *Miranda* is in custody in violation of the Constitution.

But even if it were open to this Court to balance the costs and benefits of retaining habeas jurisdiction over *Miranda* claims, that jurisdiction should be retained. The benefits are substantial. A defendant convicted upon a confession admitted in violation of *Miranda* has been convicted upon his own compelled testimony. The defendant has not received a fair trial. The habeas corpus remedy serves its core purpose — providing relief from unconstitutional custody.

The marginal costs are comparatively slight. Excluding *Miranda* from habeas jurisdiction will not exclude confession claims, which will continue to be made, but under the more complex, burdensome, and unclear voluntariness standards of the due process clause. Federal-state friction will continue, and the finality of convictions will be placed in greater doubt, if federal habeas courts are instructed to discard the comparatively clear-cut *Miranda* rules.

The substantial differences between *Miranda* and the Fourth Amendment exclusionary rule make this case and *Stone v. Powell* far different and require a different result here.

ARGUMENT

I. THE FEDERAL COURTS ARE REQUIRED TO HEAR PROPERLY PRESENTED CLAIMS OF UNCONSTITUTIONAL CUSTODY.

"Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). In 28 U.S.C. §§ 2241(c)(3) and 2254(a), Congress has conferred federal jurisdiction over properly preserved and presented claims that prisoners are "in custody in violation of the Constitution or laws or treaties of the United States." To withdraw this jurisdiction is a legislative not a judicial prerogative, for, as the Court has said, the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

We respectfully submit that the Court is not free, as petitioner and some of her *amici* suggest, to withdraw whole categories of constitutional claims from habeas jurisdiction — whether the claims derive from *Miranda v. Arizona*, 384 U.S. 436 (1966), or any other source. A long and unbroken line of cases stands against the idea that the federal courts are free to sort constitutional claims into those that are "worthy" to be entertained on federal habeas corpus, and those that may be ignored as somehow "unworthy." In *Brown v. Allen*, the Court observed that "[d]ischarge from conviction through habeas corpus is not an act of judicial clemency," which the courts are free to extend or withdraw as they choose. Rather, it is "a protection against illegal custody." 344 U.S. at 465.

Just last year, in *McClesky v. Zant*, 111 S. Ct. 1454 (1991), the Court stated that "[w]ith the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner." *Id.* at 1462 (citing *Stone v. Powell*, 428 U.S. 465, 495 (1976), *Brown v. Allen*, 344 U.S. 443 (1953),

and *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977)). In *Sykes*, the Court noted that *Brown* "made explicit that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas." 433 U.S. at 79. These statements accord with the historical understanding of the writ, and with the Court's undeviating practice since its 1953 decision in *Brown v. Allen*.[2]

This was the Court's clear understanding in *Brown v. Allen*. Justice Reed's opinion for the Court addressed four sets of preliminary issues: exhaustion of state remedies, 344 U.S. at 447-50; the effect of a prior denial of certiorari, *id.* at 456-57; deference to state court factual determinations, *id.* at 458; and the circumstances when a federal habeas court should hold a new "trial" on the facts, or when it may dispose of the petitioner's claims upon the state court record. *Id.* at 460-65.

What is most striking, in light of the arguments that petitioner and her *amici* now make, is that after treating these procedural issues, Justice Reed's opinion did not even question

[2] A number of decisions prior to 1953 indicated that the writ was unavailable to a state prisoner who had received a full and fair hearing in the state courts, but these decisions reflected the more restricted view of their era of the content of due process of law under the Fourteenth Amendment. "[W]ith rare exceptions, there were no other federal claims [than the denial of a full and fair hearing] available at the time." *Wright v. West*, 112 S. Ct. 2482, ___ (1992) (O'Connor, J., concurring). Consequently, even before *Brown v. Allen*, available constitutional claims were cognizable on federal habeas corpus.

Stone v. Powell does not mark a departure from this view. *Stone* was based, not on a contrary view of the scope of federal habeas corpus jurisdiction, but on a particular view of the Fourth Amendment exclusionary rule. *See* pp. 9-12, *infra*. Indeed, Justice Powell, the author of the Court's opinion in *Stone*, later reaffirmed that habeas corpus "permits the federal courts . . . to vacate a final conviction on *any* properly preserved ground of federal constitutional error." *Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J., concurring) (emphasis supplied).

whether properly preserved constitutional claims were within federal habeas corpus jurisdiction. The opinion noted that "[q]uestions of discrimination and admission of coerced confessions lie in the compass of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 466. Because the petitioners had stated and preserved claims of unconstitutional custody, the Court undertook a 22-page analysis of the merits. *Id.* at 466-87. Nowhere did Justice Reed's opinion evidence the slightest doubt about the federal courts' obligation to decide the merits of properly preserved and presented federal constitutional claims.

Justice Frankfurter's opinion for a majority of the Court did not question that habeas jurisdiction extended to claims of any stripe of unconstitutional confinement:

> It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims. . . .
>
> . . . [T]he prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. . . .

Id. at 499-500 (Frankfurter, J., concurring). Nowhere did Justice Frankfurter suggest that there was a distinction between "worthy" and "unworthy" constitutional claims, or that the Court was free to allow the states the last word on those deemed somehow "unworthy."

In the period between the decision in *Brown v. Allen* in 1953, and the amendment and recodification of the habeas statute in 1966, the Court held all variety of constitutional claims to be cognizable. Not once did the Court express doubt that federal habeas jurisdiction extends to every strain of un-

constitutional custody.[3] Just a few months before the 1966 enactment, the Court stated positively of defendants in a state court prosecution that "[i]f at their trial they are in fact denied *any* federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them." *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 829 (1966) (emphasis supplied).

In 1966, Congress revised and recodified the habeas statute. Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1104 (1966). In § 2, the act inserted the present paragraph (a) in 28 U.S.C. § 2254, which provides that a federal court shall entertain a petition by a prisoner under a state court sentence "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This language reproduced language from 28 U.S.C. § 2241, which was the basis for the Court's consistent holdings that the remedy of federal habeas corpus is available for claims of every sort of unconstitutional custody. Congress's purpose in preserving and reenacting this language is plain: to preserve habeas jurisdiction over all manner of claims of unconstitutional custody.[4]

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[3] *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966) (pre-trial publicity); *Pate v. Robinson*, 383 U.S. 375 (1966) (incompetence to stand trial); *Boles v. Stevenson*, 379 U.S. 43 (1964) (per curiam) (procedures to determine voluntariness of confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Rogers v. Richmond*, 365 U.S. 534 (1961) (involuntary confession); *Douglas v. Green*, 363 U.S. 192, 193 (1960) (equal protection clause claim by indigent who could not afford docket fee to appeal; "Clearly federal habeas corpus is an appropriate remedy under these circumstances."); *United States ex rel. Jennings v. Ragen*, 358 U.S. 276 (1959) (coerced confession); *Massey v. Moore*, 348 U.S. 105 (1954) (incompetence and right to counsel); *Leyra v. Denno*, 347 U.S. 556 (1954) (coerced confession).

[4] Indeed, the Court indicated as much in *Neil v. Biggers*, 409 U.S. 188 (1972). There the Court held that 28 U.S.C. § 2244(c), which also was enacted in the 1966 legislation, did not bar the habeas petition of a prisoner whose conviction this Court had affirmed on direct appeal by an equally divided vote. 409 U.S. at 190-92. The Court concluded that Congress intended to codify prior judicial limitations on successive rounds of federal court review of state convictions, but "without endangering the principle that each [prisoner] is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus." *Id.* at 191.

Last term, in *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992), the Court employed similar reasoning in concluding that Congress had acquiesced in prior judicial constructions of federal diversity jurisdiction, when it reenacted the jurisdictional statute, 28 U.S.C. § 1332. 112 S. Ct. at 2213. The same reasoning applies in the present case, with even greater force.[5] Further, as the Court said in *Ankenbrandt*, "[c]onsiderations of *stare decisis* have particular strength in this context, where 'the legislative power is implicated, and Congress remains free to alter what we have done.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)).

II. STONE V. POWELL, 428 U.S. 465 (1976), DID NOT CARVE AN EXCEPTION OUT OF FEDERAL HABEAS CORPUS JURISDICTION OVER CLAIMS OF UNCONSTITUTIONAL CONFINEMENT.

In *Stone v. Powell*, 428 U.S. 465 (1976), the Court did not revoke any of the jurisdiction that Congress has conferred over claims of unconstitutional imprisonment. *Stone* concerned the scope and meaning of the Fourth Amendment exclusionary rule, as applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Stone* was not a case about habeas corpus, as such. The

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[5] Justice Blackmun, in his concurrence in *Ankenbrandt*, took issue with the majority's recognition of a diversity jurisdiction exception for domestic relations actions, on the historical evidence presented there. *Id.* at 2217 (Blackmun, J., concurring). Justice Blackmun's objections in that case are inapplicable here, where the plain meaning of the statute and the historical record are both in accord that federal habeas jurisdiction extends to all claims of unconstitutional custody.

Court stressed that it was not deciding any question of "the statutory scope of the habeas corpus statute," *id.* at 482 n.17, and it was not refusing Congress's grant of jurisdiction:[6]

> Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. . . . [W]e emphasize the minimal utility of the [exclusionary] rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. . . .

Id. at 494 n.37 (emphasis in original).

As the Court described it, the *Mapp* rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Id.* at 486 (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)). It "is a judicially created remedy rather than a personal constitutional right . . . ." *Id.* at 494 n.37. Indeed, the Court said that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights," for they do not "'impugn the integrity of the fact-finding process . . . .'" *Id.* at 479 (quoting *Kaufman v. United States*, 394 U.S. 217, 224 (1969)).

The *Stone* Court's theory of the Fourth Amendment exclusionary rule implies that persons convicted on illegally seized evidence are not thereby "in custody in violation" of the Fourth Amendment.[7] Indeed, the *Mapp* rule, as viewed in *Stone*, is an anomaly in the adversarial process in criminal cases. Illegally seized evidence is excluded solely to deter (or refuse to encourage) future illegal seizures. The intended beneficiaries of exclusion are those who, but for the deterrent effect of exclusion, would be victimized by illegal searches and seizures in the future. The criminal defendant who actually moves to suppress the evidence is, at best, a necessary but incidental beneficiary.

[6] The dissents submitted that the majority in *Stone* was improperly cutting into habeas corpus jurisdiction, a suggestion that the Court rejected. *Id.* at 536 (White, J., dissenting); *id.* at 515 (Brennan, J., dissenting).

[7] In another context, the Court observed in *New York v. Harris*, 495 U.S. 14 (1990), that a Fourth Amendment violation in the form of a warrantless entry into a home does not "somehow render[] unlawful continued custody of the suspect" who is arrested inside. *Id.* at 18. If the police have probable cause to arrest, the suspect is "not unlawfully in custody when he [is] removed to the station house . . . ." *Id.* Similarly, under a deterrence-based exclusionary rule, an antecedent Fourth Amendment violation does not render unconstitutional the defendant's custody under a sentence imposed after an otherwise lawful conviction.

On this view of *Mapp*, the Court in *Stone* concluded that it was free to balance the benefits against the costs of enforcing that rule in federal habeas corpus proceedings. The Court was undertaking "[t]he same pragmatic analysis of the exclusionary rule's usefulness in a particular context," *id.* at 488, as in a long line of cases decided before,[8] since,[9] and at the same time as *Stone*.[10] The Court concluded that no significant additional deterrence of the police could be achieved on collateral review, and that the *Mapp* exclusionary rule should not be applied. *Id.* at 489-95.

In the 16 years since *Stone* was decided, not once has the Court declared itself free to excise a category of claims of unconstitutional custody from the habeas jurisdiction that Congress has conferred. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986) (ineffective assistance of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *Cardwell v. Taylor*, 461 U.S. 571, 583 (1983) (Fifth Amendment claims); *Rose v. Mitchell*, 443 U.S. 5645 (1979) (racial discrimination in selection of grand jury); *Brewer v. Williams*, 430 U.S. 387 (1977) (Sixth Amendment violation by use of deliberately elicited statements).

[8] *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury use); *Brown v. United States*, 411 U.S. 223 (1973) (standing).

[9] *E.g.*, *Illinois v. Krull*, 480 U.S. 340 (1987) (reasonable reliance on statute); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation cases); *United States v. Leon*, 468 U.S. 897 (1984) (reasonable reliance on warrant).

[10] *United States v. Janis*, 428 U.S. 433 (1976) (civil tax suit) (decided same day as *Stone*).

Kimmelman v. Morrison, *supra*, shows the Court's unwillingness to expand *Stone* beyond its limited rationale. There, the Court held that *Stone* did not preclude habeas jurisdiction over a Sixth Amendment claim based on counsel's ineffectiveness in failing to obtain suppression of evidence seized in violation of the Fourth Amendment. The Court eschewed any power to excise unfavored claims from federal habeas jurisdiction: the Court's opinion and Justice Powell's concurrence explained that *Stone* was based on the special nature of the Fourth Amendment exclusionary rule. The Court distinguished between a Fourth Amendment exclusionary rule claim, which "is not a trial right," and a Sixth Amendment claim of ineffective assistance of counsel, which is a trial right — even when predicated on counsel's failure to raise a Fourth Amendment issue. 477 U.S. at 374. Justice Powell pointed out that before the Court in *Stone* began balancing costs against benefits, it first "reasoned . . . that the [Fourth Amendment] exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel." *Id.* at 392 (Powell, J., concurring). A Sixth Amendment violation, in contrast, should be remedied on federal habeas because it strikes at "the defendant's right to a fundamentally fair trial." *Id.* at 393.

III. A HABEAS PETITIONER CONVICTED ON A CONFESSION ADMITTED IN VIOLATION OF *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION.

A. *Miranda*'s Holdings

The Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which is at issue here, stands on a different footing from *Mapp v. Ohio*, 367 U.S. 643 (1961). The balancing that the Court undertook in *Stone* is misplaced when a state prisoner presents a properly preserved claim under the Fifth Amendment

self-incrimination clause and *Miranda*, which enforces that provision.

Miranda was a complex decision. It is useful to recount the series of holdings that the *Miranda* Court reached.

First, the Court held that the Fifth Amendment self-incrimination clause, not just the due process clause, applies to custodial interrogation. 384 U.S. at 460-65.

Second, the *Miranda* Court found that, in the context of custodial interrogation, a waiver of Fifth Amendment rights is invalid unless it is knowing and intelligent under the standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938). 384 U.S. at 475-76.

Third, there is a right to counsel during custodial interrogation, necessary to protect the Fifth Amendment. *Id.* at 469-70.

Fourth, this right to counsel is independently subject to the knowing and intelligent waiver standard. *Id.* at 470-71.

Fifth, because of the nature of the rights involved, the inherent coercion of custodial interrogation, and the secrecy that often surrounds it, the burden is on the government to demonstrate knowing and intelligent waiver of these rights. No confessions or admissions obtained during custodial interrogation should be admitted into evidence unless the government carries this "heavy burden." *Id.* at 475.

Sixth, to carry its burden, the government must show that the defendant received the now-familiar warnings, unless some equally effective alternative means were employed to protect the defendant's rights. *Id.* at 467.

Seventh, an additional element of the government's burden of demonstrating knowing and intelligent waiver is that if the defendant invoked his right to remain silent, the government must show that this right was "scrupulously honored." 170 *Id.* at 473-74, 479.[11]

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[11] The Court further explained the meaning of this requirement in *Michigan v. Mosley*, 423 U.S. 96 (1975).

Eighth, as another element of its burden, the government must show that if the defendant invoked his right to counsel, the defendant rather than the government initiated further discussion, unless counsel was present. *Id.* at 474.[12]

Two animating considerations in the *Miranda* decision are the inherent coercion of custodial interrogation, particularly at the police stationhouse, and the often insurmountable difficulties in reconstructing what actually occurred. The decision repeatedly noted the unavailability of reliable, objective, and complete evidence about police interrogations, which "have largely taken place incommunicado. . . ." *Id.* at 445. The secrecy of such interrogations "results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. . . ." *Id.* at 448. Additionally, an important reason for requiring counsel in the interrogation room is that the lawyer later can recount what happened. *Id.* at 470.[13]

The Court never has cast doubt on the validity of these concerns. In *Miller v. Fenton*, 474 U.S. 104 (1985), the Court reconfirmed its understanding that, in contrast to proceedings in court, "the critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment." *Id.* at 117.

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[12] A series of later cases, beginning with *Edwards v.Arizona*, 451 U.S. 477 (1981), explain the meaning of this requirement. *See also Arizona v. Roberson*, 486 U.S. 675 (1988); *Smith v. Illinois*, 469 U.S. 91 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Wyrick v. Fields*, 459 U.S. 42 (1982).

[13] Neither consideration was a fresh discovery in 1966. Over 60 years ago, the ABA's Section on Criminal Law and Criminology empaneled a committee to study the "third degree" and other police abuses. *See Report of Committee on Lawless Enforcement of Law*, 1 AM. J. POLI. SCI. 575 (1930). The committee noted, and condemned, the prevalence of "'the third degree' in the sense of rigid and severe examination of men under arrest by police officers or prosecuting attorneys . . . ." *Id.* Citing an earlier study of The Association of the Bar of the City of New York, the ABA committee noted that incommunicado pre-arraignment questioning created the "opportunity for extorting confessions in secret and by unlawful means, the use of

Miranda's rules were intended to respond to both concerns. Under *Miranda*, before the defendant's admission or confession can come in as evidence, the state must show that the inherent pressures of custodial interrogation were alleviated by the prescribed procedures. Further, proof of compliance with relatively clear-cut *Miranda* standards avoids, at least to a degree, the problem of ascertaining what actually occurred in stationhouse interrogation.

B. Differences Between *Miranda* and *Mapp*

These features of *Miranda* mark it as far different from the Fourth Amendment exclusionary rule as interpreted in *Stone*.[14]

First, the foremost function of the *Miranda* rules is to prevent the trial court from committing a present violation of a defendant's constitutional rights, through use of a compelled statement to secure a criminal conviction. The Fifth Amendment does not forbid compulsion in *obtaining* a statement, but it directly forbids such use. *Kastigar v. United States*, 406 U.S.

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which means may be subsequently denied without fear of successful contradiction." *Id.* at 578 n.8.

See Oregon v. Elstad, 470 U.S. 298, 366 (1985) (Stevens, J., dissenting) ("Even before [*Miranda*], it had been recognized that police interrogation of a suspect who has been taken into custody is presumptively coercive."); *Columbe v. Connecticut*, 367 U.S. 568, 573-74 (1961) (Frankfurter, J.) ("What actually happens . . . behind the closed door of the interrogation room is difficult if not impossible to ascertain."); *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting) (custodial examination is "inherently coercive"). *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966), *reprinted in* Y. Kamisar, POLICE INTERROGATION AND CONFESSIONS: Essays in Law and Policy 41, 73-75 (1980) (discussing *Davis v. North Carolina*, 384 U.S. 737 (1966)).

[14] Because of the differences between *Mapp* and *Miranda*, balancing the costs against the benefits of enforcing *Miranda* on collateral review is inappropriate, but even if it is performed, the balancing yields a different result here than in *Stone v. Powell*. *See* pp. 21-24, *infra*.

441 (1972).[15] Thus *Miranda* requires a trial court to exclude evidence to avoid *committing* a *present* constitutional violation against the defendant him or herself. *Mapp*, in contrast, requires suppression of evidence obtained through a *past* constitutional violation, in the hope of preventing *future* constitutional violations against the people generally.

Second, the rights that *Miranda* protects are fundamental trial rights, for "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court recognized that *Miranda*, unlike the Fourth Amendment, protects the right to a fair trial, when the Court declined to employ the knowing and intelligent waiver standard of *Miranda* to consent searches. The Court observed that "[a]lmost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Id.* at 237. *Miranda*, but not the Fourth Amendment, belongs to this class of rights; "the basis for decision [in *Miranda*] was the need to protect the fairness of the trial itself." *Id.* at 240.[16]

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[15] In this sense, it can be said loosely that the Fifth Amendment, unlike the Fourth Amendment, has a "built-in" exclusionary rule. *See* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 386-93 (1977).

[16] The *Schneckloth* Court also observed that *Miranda* adopted the knowing and intelligent waiver standard because of the inherent coercion of custodial interrogation. 412 U.S. at 246-47. On the facts of *Schneckloth*, consent was given in a non-custodial setting, and the Court accordingly did not decide whether the higher waiver standard might be required when the police seek consent to search in a custodial setting. *Id.* at 240 n.29. Later cases, however, apply the same voluntariness standard under the Fourth Amendment even when the individual is in custody. *United States v. Watson*, 423 U.S. 411 (1975); *see* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.10, at 237 (2d ed. 1992). The distinction that supports different waiver standards in *Miranda* and *Schneckloth* is that the Fifth Amendment is one of the essential attributes of a fair and adversarial trial under our system of justice. The Fourth Amendment serves vital interests, but they "are of a wholly different order." *Schneckloth*, 412 U.S. at 242. In *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the Court underscored these points. It explained *Schneckloth*'s refusal to employ the knowing-and-intelligent waiver standard for consent searches on the basis of the distinction between trial rights and non-trial rights. The Fourth Amendment does not directly protect or create trial rights. What the Fourth Amendment assures "is not that no government search of [a defendant's] house will occur unless he consents; but that no search will occur that is 'unreasonable.'" *Id.* at 2798. Consequently, a knowing-and-intelligent waiver standard is out of place.

Third, the "*Miranda* rules" were not set down solely to deter police misconduct. Indeed, their principal audience is the trial courts. The police are only a secondary audience.

In this sense, the *Miranda* standards are "decision rules" for the courts. The *Miranda* standards "inform [ ] courts under what circumstances statements obtained during [custodial] interrogation are not admissible." *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990). Secondarily, the *Miranda* standards also imply "conduct rules" for the police; they "inform [ ] police and prosecutors with specificity as to what they may do in conducting custodial interrogation." *Id.* But the impact on the police is incidental to the rules' primary function.

Miranda raised evidentiary hurdles in the form of irrebuttable presumptions for assessing whether the *Johnson v. Zerbst* waiver standard was met. *See Minnick*, 111 S. Ct. at 492 (Scalia, J., joined by Rehnquist, C.J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *id.* at 364 (Stevens, J., dissenting); *New York v. Quarles*, 467 U.S. 649, 670 (1984) (O'Connor, J., concurring and dissenting). These presumptions are in principle no different from evidentiary requirements that the Court has set in a wide variety of contexts as a matter of federal constitutional law. Discrimination in jury selection is one area where the Court has established relatively rigid

evidentiary requirements — employing presumptions, and setting the level of evidence necessary to rebut them (if they are of the rebuttable variety). The Court has used such tools to give practical effect to prohibitions against discriminatory use of peremptory strikes of petit jurors, *Batson v. Kentucky*, 476 U.S. 79 (1986); *see Swain v. Alabama*, 380 U.S. 202 (1965), and against discrimination in selecting grand jurors. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

The justification for the *Miranda* presumptions is fundamentally no different from that of other irrebuttable, or conclusive, presumptions.[17] Most such presumptions are employed when some impediment prevents consistently accurate case-by-case determinations of the disputed issue, or when case-specific determinations are unduly burdensome. A presumption is justified in those circumstances, "when application of the presumption . . . reach[es] the correct result most of the time." *Coleman v. Thompson*, 111 S. Ct. 2546, 2558 (1991).

The *Miranda* Court found that these ordinary requisites for a conclusive presumption were met. The Court also found an additional justification for conclusively presuming coercion. During custodial interrogation, the state, through the police, is in control. It is fully within the state's power to assure adherence to the procedures. Moreover, following the *Miranda* procedures is mostly simple and straightforward. Consequently, the *Miranda* Court rejected the sufficiency of evidence of a valid waiver, assembled after the fact. "[T]he expedient of giving an adequate warning as to the availability of the privilege so simple, [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468-69.

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[17] *See* Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

Nonetheless, in certain special settings, the Court has found that *Miranda*'s irrebuttable presumption of coercion should not apply. *Oregon v. Elstad*, 470 U.S. 298 (1985) (fruit of the poisonous tree); *New York v. Quarles*, 467 U.S. 649 (1984) (on-the-scene emergencies); *see also Michigan v. Tucker*, 417 U.S. 433 (1974) (fruit of the poisonous tree; pre-*Miranda* interrogation).

In *Elstad*, for example, the Court held that a suspect's unwarned admission, made in response to brief questioning at the moment of his arrest in his own home, did not preclude his valid waiver of his rights later when he was properly warned at the stationhouse. The Court declined to apply "cat out of the bag" reasoning to this circumstance.[18] For the Court found no violation of "the Fifth Amendment itself" in the use of Elstad's first statement, 470 U.S. at 306, finding that the statement, "though technically in violation of *Miranda*, was voluntary." *Id.* at 318.

Two of the justifications for *Miranda*'s presumption were comparatively weak on the facts of *Elstad*, as the Court viewed them. Although the setting met *Miranda*'s broad test for "custody," Elstad's initial admission was not extracted in the sort of "incommunicado interrogation . . . in a police-dominated atmosphere" that was the *Miranda* Court's central concern. There was no secret interrogation session to penetrate, and there was no specific evidence that custody itself had begotten compulsion, even in the absence of warnings.[19]

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[18] The Court stated that *Miranda* "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." 470 U.S. at 306. Such a result, of course, is inevitable with irrebuttable presumptions generally. They substitute for fact-specific determinations of disputed issues, usually because accurate fact-specific determinations too often cannot be achieved or are unjustifiably burdensome. By their nature, presumptions are apt to be over- or under-inclusive.

[19] The setting of *New York v. Quarles*, 467 U.S. 649 (1984), also was much different from the archetypal police interrogation room, or other

The rationale that most strongly supported applying an irrebuttable presumption of coercion was the ease with which the state could have avoided the presumption. The state's agents, the police, easily could have warned Elstad in his home, and the problem could have been avoided at the outset. And the Court's *Elstad* opinion nowhere questioned that *Miranda*'s irrebuttable presumption of coercion required exclusion of the initial statement itself. For this purpose, *Miranda* required the trial court to presume the statement coerced. But the Court declined to ascribe greater force to *Miranda*'s presumption than this.

Nothing in *Elstad* undercuts the fact that the trial court was obligated, as a matter of federal constitutional law, to treat Elstad's initial statements as coerced, for the purpose of excluding them from evidence. This Court stressed that it "in no way retreats from the bright line rule of *Miranda*." *Id.* at 317. Had the trial court failed to exclude the statements (and if the error was prejudicial), Elstad's custody would have violated the Constitution, and habeas corpus relief should have been available to him.[20]

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police-dominated setting where a suspect might reasonably fear abuse. *See United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (suspect in back seat of police car feared beating). Quarles was questioned briefly but without warnings at the site of his arrest in a Queens, New York, supermarket.

[20] *Quarles* was based on similar reasoning. There the Court found that a pressing public need — to find a gun secreted somewhere among the aisles of a supermarket in a crowded city — precluded giving effect to *Miranda*'s presumption of coercion in unwarned custodial interrogation. As in *Elstad*, the setting bore little resemblance to a stationhouse interrogation room, *see* n.19 *supra*, and the strongest reason for recognizing the presumption would have been the ease and simplicity of giving *Miranda* warnings. But the Court found that the need to protect the public justified the failure of the police to do so. If there had been no public emergency, the plain terms of *Miranda* would have required suppression of the suspect's statement as presumptively coerced. In that circumstance, if the state courts had erroneously admitted the statement, the defendant's custody, under the conviction and sentence that resulted, would have violated the Constitution, and habeas corpus should have been available.

IV. THE BENEFITS OF ENFORCING *MIRANDA* ON HABEAS CORPUS OUTWEIGH THE COSTS.

For the reasons just explained, the balancing that the Court conducted in *Stone* is not appropriate for a *Miranda* claim. But even if it were, the balance tips differently here than in *Stone*.

Stone v. Powell was a careful and considered opinion. The Court's balancing of costs and benefits from enforcing *Mapp* on collateral attack was exacting. Similarly careful balancing, taking account of the substantial differences between *Mapp* and *Miranda*, leads to the opposite result here than in *Stone*.

To begin with, the benefits of enforcing *Miranda* "are of a wholly different order" from the Fourth Amendment interests at issue in *Stone*. *Schneckloth*, 412 U.S. at 241. In *Stone*, the Court saw virtually no benefit from enforcing *Mapp*, since no additional police deterrence could be achieved. The Court concluded that it would make negligible difference in future police behavior if, perhaps years after the fact, a federal judge declared an officer's conduct in violation of the Fourth Amendment. *Stone*, 428 U.S. at 493-94. No policy of our adversarial system requires suppressing evidence obtained in a prior illegal search. Indeed, in the Court's view in *Stone*, the *Mapp* exclusionary rule and our accusatorial-adversarial system are themselves in conflict. *Id.* at 489-90.

Custody upon a conviction resting on presumptively coerced statements is entirely different. Providing relief from such custody safeguards the habeas petitioner's right to a fair and adversarial trial. For enforcing *Miranda* assures that the petitioner's custody is not in violation of the Fifth Amendment — a mainstay of our adversarial system. Moreover, admission of coerced confessions — even "presumptively" coerced confessions — entails risks of conviction on unreliable evidence that simply are not present when the police have seized tangible evidence, even if they did so illegally. The hazards of confessions are well known, and coerced confessions always pose

risks of unjust conviction. *Miranda*, 384 U.S. at 455 n.24. It is safe to assume that physical evidence seized in violation of the Fourth Amendment nearly always is reliable; at any rate, the legality *vel non* of its acquisition has nothing to do with reliability. *Stone*, 428 U.S. at 490.

Moreover, one important goal of federal habeas is to promote state court adherence to the requirements of federal law. *Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990); *Teague v. Lane*, 489 U.S. 288, 306-07 (1989) (O'Connor, J.). Retaining habeas jurisdiction over *Miranda* claims will serve this goal. The *Miranda* rules for admission of confessions are comparatively few in number and simple, even rigid. *See, e.g.*, *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990). Moreover, the need to apply them correctly is recurring. When the state courts have departed from those rules, federal intervention is likely necessary to correct a basic misunderstanding of federal law, which, unless corrected, will recur. Moreover, federal courts regularly face the same problems in applying *Miranda* as do state courts. The review of *Miranda* claims by life-tenured federal judges fully comports with the bedrock duty of the federal judiciary to protect and enforce federal rights, and such review is squarely within federal judges' competence.

On the other side of the ledger, the incremental cost of retaining federal habeas jurisdiction over *Miranda* claims is comparatively slight. The sorts of costs that the Court could avoid by excluding search and seizure claims from habeas corpus cannot so easily be avoided in the confession arena.

Miller v. Fenton, *supra*, would require the federal courts to continue to review confession claims *de novo*, but under the due process clause rather than *Miranda*.[21] As the present case

[21] This would be the result of a decision excising from habeas jurisdiction all claims predicated on any aspect of the *Miranda* decision. *Miranda*, of course, fashioned several rules, *see* pp. 13-14, *supra*, and some intermediate position can be imagined. For example, *Miranda*-based claims that the petitioner did not make a knowing and intelligent waiver still might be heard — but without benefit of *Miranda*'s irrebuttable presumptions. Under any such scheme, as under a complete excision of *Miranda* from § 2254(a), the federal courts would remain in the business of assessing the admissibility of confessions, and benefits in the form of reduced federal-state friction and increased finality of convictions would be small.

well illustrates, in many cases *Miranda* claims and voluntariness claims can be made side-by-side. Federal-state friction in confession issues would not be eliminated by eliminating *Miranda* from habeas; only the contact point would be moved.

Indeed, assessing the admissibility of confessions under a totality-of-the-circumstances test can be more intrusive than assessing compliance with the comparatively few and fixed *Miranda* rules. The voluntariness determination requires the federal habeas court to determine, with far less specific guidance than *Miranda* provides,

> whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means . . . .

Miller v. Fenton, 474 U.S. at 116.

The due process test surely is more burdensome on the federal courts. As the Court observed in *Schneckloth*, "[t]he significant fact about [the Court's pre-*Miranda* due process confession decisions] is that none of them turned on the presence or absence of a single criterion; each reflected a careful scrutiny of all the surrounding circumstances." 412 U.S. at 226.[22]

[22] The Court in *Miller* also acknowledged that "[t]he voluntariness rubric has been variously condemned as 'useless'; 'perplexing'; and 'legal "double-talk."'" 474 U.S. at 116 n.4 (citations omitted). Whatever the justice of this condemnation, the voluntariness standard undeniably is far more burdensome to apply, and less predictable in outcome, than *Miranda*.

In contrast, *Stone v. Powell*, by excluding unadorned *Mapp* claims from habeas jurisdiction, virtually excluded search and seizure issues. No such result is possible here as to confessions.

For the same reason, extending *Stone* to *Miranda* would not promote finality of convictions to any comparable degree as did *Stone*. Confession claims still would be made, but under a due process rather than *Miranda* heading. Indeed, the greater complexity of the due process/voluntariness standards for confessions would breed greater uncertainty as to the finality of convictions.

Even if a balancing test is employed — and we believe it should not be — excising *Miranda* claims from federal habeas corpus jurisdiction is unjustified. The same analysis that the Court employed in *Stone* as to claims under *Mapp* yields a different result here.

CONCLUSION

For the foregoing reasons, this Court should reaffirm that federal habeas corpus jurisdiction extends to claims of state prisoners that they were convicted upon confessions compelled under the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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Respectfully submitted,

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